Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1263

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (AFL-CIO), *et al.*,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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Opinions Below

The memorandum of decision of the Superior Court on liability is reported unofficially at 68 L.R.R.M. 2488, 58 CCH Lab. Cas. ¶51,930, and its memorandum of decision following the first damages trial is reported unofficially at 70 L.R.R.M. 2577, 59 CCH Lab. Cas. ¶52,043. The first opinion of the Supreme Court of Connecticut is reported officially at 161 Conn. 79, 285 A.2d 330, *cert. denied* 404 U.S. 1016.

The memorandum of decision of the Superior Court following the second damages trial is not reported. The second opinion of the Connecticut Supreme Court, on the amount of compensatory damages, is not yet officially reported, but is reported unofficially in 37 Conn. Law Jour-

nal for September 2, 1975, at 7-13, and at 90 L.R.R.M. 2249.[1] It is the second opinion that is the subject of the Petition for Certiorari.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). The second of the claimed "Questions Presented" (the "due process" question) was not "specially set up or claimed under the Constitution" in a proper manner below, as discussed at pages 19-20 herein.

Questions Presented

The first of the claimed "Questions Presented" is not presented by the facts of the case, as discussed at pages 18-19 herein.

Counter Statement of the Case

Respondent disagrees with petitioners' Statement of the Case (Petition 4-25), which bears little resemblance to the facts found by the trial court and approved by the Connecticut Supreme Court. Respondent also disagrees with petitioners' History of this Litigation (Petition 25-32), which distorts the evidence at the trials, the findings and decisions of the trial court, and the Connecticut Supreme Court's decisions.

The parties having stipulated for a separation of the issues of liability and damages, the liability trial, requiring

1. Petitioners' printing of the Connecticut Supreme Court's second opinion in their Appendix (110a-125a) contains a number of typographical errors, particularly on pages 117a (where words are added) and 119a (where a number of words are omitted). By letter dated March 24, 1976, petitioners agreed to correct the errors, as requested by respondent, but the corrections had not been made when this brief went to the printer on April 15, 1976. On the latter date, petitioners stated that the corrections would be made shortly.

18 trial days, took place in early 1968, and resulted in a determination of liability (A.29a-55a). The first damages trial, requiring 12 trial days, took place in July, 1968, and resulted in judgments for compensatory and exemplary damages (A.56a-64a). The Connecticut Supreme Court affirmed as to liability for events occurring at plaintiff's plant premises but not as to events away from the premises, affirmed as to exemplary damages, and remanded for a new trial on compensatory damages (A.65a-91a). After the denial of the unions' petition for certiorari, 404 U.S. 1016 (1972), the second damages trial, requiring 24 trial days, took place in late 1972 and early 1973, and resulted in the judgments for compensatory damages now sought to be reviewed by petitioners (A.94a-109a). The Connecticut Supreme Court affirmed (A.110a-125a).

Under Connecticut law the trial court's findings, not its memorandum of decision, are the basis of appellate review.[2] Respondent has filed herein certified copies of the printed records before the Connecticut Supreme Court in the two appeals. The first (bearing docket number 6646) is the record from the liability and first damages trial ("First Trial R."); the trial court's Finding (First Trial R.183-431) includes 760 findings of fact (First Trial R.183-310). The second printed record (bearing docket number 7576) is the record from the second damages trial ("Second Trial R."); the trial court's Finding (Second Trial R.137-246) includes 357 findings of fact (Second Trial R.137-212).

Petitioners' Statement of the Case relies largely on proposed or draft findings (abbreviated "D.F." in their peti-

2. "The only available source of facts on any appeal is the finding as provided for by statute." *Munson* v. *Atwood*, 108 Conn. 285, 290 (1928); "The memorandum of decision establishes no facts and cannot take the place of the finding, which is essential to test rulings on evidence and conclusions of law or fact drawn by the trier. . . ." *Saraceno* v. *Capitol Theatre Realty Corp.*, 154 Conn. 669, 672 (1967).

tion) not adopted by the trial court; the following Counter Statement of the Case relies exclusively on the findings of fact ("F." herein) made by the trial court and contained in the printed records.[3]

1. *The Parties.* Plaintiff United Aircraft Corporation is a Delaware corporation with its offices in East Hartford, Connecticut (F.3, First Trial R.183). In 1960, its Pratt & Whitney Aircraft Division, which manufactured aircraft engines, had plants at East Hartford, Connecticut, with 22,000 employees, Manchester, Connecticut, with 175 to 200 employees, Southington, North Haven, and Meriden, Connecticut, and West Palm Beach, Florida (F.3-5, 7, 12, First Trial R.183-185). Its Hamilton Standard Division, which manufactured propellers, jet engine accessories, and electronic devices, had plants at Windsor Locks, Connecticut, with 6500 employees, and Broad Brook, Connecticut, with 700 employees (F.3, 5, 22, First Trial R.183-185).

Defendant International Association of Machinists ("International"), frequently known as the "Grand Lodge", is an unincorporated voluntary association with its headquarters in Washington, D. C. (F.33, 34, First Trial R.187). In 1959 and 1960, Albert J. Hayes was President of the International, and Fred Coonley was one of its General Vice Presidents (F.33, 37, 40, First Trial R.187-188). Vice President Coonley was based in New York City, and plaintiff's East Hartford, Manchester, Windsor Locks and Broad Brook plants were in the geographical area for which he was responsible (F.40, First Trial R.188). Under his supervision were Grand Lodge Representatives appointed by the International President whose general duties included organizing, negotiating contracts, settling grievances, settling disputes within local lodges and district

3. The Connecticut Supreme Court's summary of the liability facts appears at pages 73a-78a of the Appendix.

lodges, handling legislative matters, assisting district and local lodges, and in strike situations assisting local lodges to make arrangements for the conduct of the strike, setting up picket lines, supervising picket lines, and assisting local lodges in obtaining support (F.39, 41, 43, First Trial R.188). During 1959 and 1960 Richard L. Thurer was the senior Grand Lodge Representative assigned to supervise District 91 and Lodges 1746 and 743, and had general supervision over the International's affairs in such area (F.45, First Trial R.189).

Defendant Aeronautical Industrial District Lodge No. 91, International Association of Machinists ("District 91") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. It is an administrative arm of the International, and has administrative control over Lodges 1746 and 743 (F.53, 56, 57, First Trial R.190). Its business affairs were administered by its Senior Business Representative John K. Main, its Business Representatives George Cope, John R. Sullivan and Robert Nelson, and its District Organizers Raymond Jutras and Robert Davis (F.60, 65, 67, 69, 71, 73, 74, First Trial R.190-191).

Defendant Industrial Aircraft Lodge No. 1746, International Association of Machinists ("Lodge 1746") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. In 1959 and 1960 it was the bargaining agent for the 16,000 bargaining unit employees at Pratt & Whitney's East Hartford plant and the 150 bargaining unit employees at its Manchester plant (F.7, 12, 78, First Trial R.184, 192). There was no union shop at the plants, and in December, 1959, Lodge 1746 had only 6178 members; by June, 1960, the membership had dropped to 5858 (F.16, 78, 101, First Trial R.185, 192, 196). In 1959 and 1960 its President was David Fraser and its Vice President was William Stewart; it also

had eight other officers, nine committeemen, and 50 to 70 stewards at the East Hartford plant (F.80, 81, 88, First Trial R.192-193). Committeemen were members of the Executive Board, and stewards, because of their duties, were considered union leaders by the membership of Lodge 1746 and were accorded that status by the union (F.89, 90, First Trial R.193-194).

Defendant Hartford Aircraft Lodge No. 743 ("Lodge 743") is an unincorporated voluntary association with its office and place of business in East Hartford, Connecticut. In 1959 and 1960 it was the bargaining agent for the 4,000 bargaining unit employees at Hamilton Standard's Windsor Locks plant and the 350 bargaining unit employees at its Broad Brook plant (F.22, 91, First Trial R.185, 194). In 1959 and 1960 its President was Butler J. Seedman (F.93, First Trial R.194). Its Vice President for Windsor Locks was Edward Batchelder and its Vice President for Broad Brook was William Merrigan, although Committeewoman Ann DeFilipo was considered the top officer of the union at Broad Brook (F.93, 97, First Trial R.194-195). Lodge 743 also had a Shop Committee, who were members of its Executive Board, and stewards, who were considered union leaders by the members and were accorded that status by the union (F.89, 90, 93, First Trial R.193-195).

2. *Events Leading Up To The Strike.* Plaintiff and Lodge 1746 were parties to collective bargaining agreements dated December 5, 1957 covering bargaining unit employees at Pratt & Whitney's East Hartford and Manchester plants. During the fall of 1959, prior to the expiration of the agreements on December 4, 1959, plaintiff bargained with Lodge 1746 on the terms of new agreements. A contract offer was made by the plaintiff, but was rejected on December 3, 1959 by the 1250 members of Lodge 1746 who voted on it, 673 to 577. Thereafter employees at the East Hartford and Manchester plants worked without contracts until the strike began on June 8, 1960 (F.99-102, First Trial R.195-196).

Plaintiff and Lodge 743 were parties to collective bargaining agreements signed April 28, 1958 covering bargaining unit employees at Hamilton Standard's Windsor Locks and Broad Brook plants. During March and April, 1960, prior to the expiration of the agreements on April 21, 1960, plaintiff bargained with Lodge 743 on the terms of new agreements. A contract offer was made by the plaintiff, but was rejected by members of Lodge 743 on April 21, 1960. Thereafter employees at the Windsor Locks and Broad Brook plants worked without contracts until the strike began on June 8, 1960 (F.111-114, First Trial R.197-198).

The primary issues at both divisions were non-economic: union shop, automatic wage progression in place of the merit rating system, plant-wide seniority, full arbitration and hearing of grievances, and control by the union over subcontracting (F.383, First Trial R.242).

Even before the expiration of the collective bargaining agreements, plans were underway at the International, District and local levels for the strike; such plans were largely dominated by the International. On November 30, 1959, there was a meeting in Hartford attended by the International's General Vice Presidents Coonley and Seimiller, whose office was in Chicago, Grand Lodge Representative Thurer, and Lodges 1746 and 743 Presidents Fraser and Seedman. They discussed the contract negotiations with United Aircraft Corporation and plans for the strike (F.104, First Trial R.196). Although not in accordance with the International's usual policy, direct responsibility for conducting the strike was delegated by the International to General Vice President Coonley and Grand Lodge Representative Thurer (F.144, First Trial R.203). Vice President Coonley had had jurisdiction over

the International's strike against Republic Aviation in Farmingdale, Long Island in 1956. That strike, which had involved much violence, had been a precedent-setting victory for the union and had produced a very good settlement including a union shop (F.123-126, First Trial R.200).

On December 15, 1959, Grand Lodge Representative Thurer, Senior Business Representative Main, Business Representatives Cope and Sullivan, and Presidents Fraser and Seedman had a meeting to discuss matters relating to United Aircraft Corporation (F.105, First Trial R.197). In January, 1960, Dean Ruth, a publicity man at the International's Washington, D. C. headquarters, was assigned by Vice President Coonley to work for Grand Lodge Representative Thurer and to assist Lodge 1746 with publicity during the early months of 1960. Mr. Ruth had handled publicity during the Republic Aviation strike in 1956 (F.129, 145, First Trial R.201, 203).

In late December, 1959, the International's General Counsel Papps discussed with either President Hayes or his assistant, General Vice President Walker, figures regarding the size of the bargaining units represented by Lodges 1746 and 743, the size of their memberships, and other vital statistics and his view that the locals would "be nuts to strike" but he was told to stay out of the matter and let things take their own course (F.106, First Trial R.197).

During the week of April 3, 1960, Business Representative Cope, District Organizer Jutras, and President Fraser met with Vice President Coonley to discuss the International's policy governing local and district lodges involved in multiple agreements, a policy which had application to the situation at United Aircraft Corporation (F.108-110, First Trial R.197). The negotiations both at Pratt & Whitney and at Hamilton Standard had been conducted not only by representatives of the local lodges

concerned but also by representatives of District 91 and the International (F.100, 112, First Trial R.196, 198).

In February, 1960, Lodge 1746 had appointed the members of its Strike Policy Committee, and Lodge 743 did likewise prior to May 15, 1960. In May both lodges prepared strike rosters listing the members of the Strike Policy Committees and their assignments, and also showing the designation of legal counsel, bondsmen, and hospitals (F.146, First Trial R.203).

On April 10, 1960, at a meeting of the members of Lodge 1746, District Organizer Jutras had reported that he had been assigned "to start a future program against" United Aircraft Corporation, that he had visited the International's local lodge at the Republic Aviation Corporation "for suggestions as to how to stage a successful strike," that if they struck they must fight and fight hard and they would need hundreds of pickets, and also attorneys to fight injunctions (F.115, First Trial R.198).

At the District 91 meeting on April 11, 1960, a week before consideration by Lodge 743 of plaintiff's final offer, District Organizer Jutras reported that he had been assigned to lay out machinery for strike action in Lodges 1746 and 743, that he had been to Farmingdale, Long Island (Republic Aviation Lodge) and "learned much", and that "experienced help" was available from Grand Lodge "to train and help our membership" (F.116, First Trial R.199). At the same meeting, Business Representative Sullivan reported that Lodge 743 was weak (F.117, First Trial R.199), and Senior Business Representative Main was authorized to hire Bushnell Hall for the planned mass meeting, of which Vice President Coonley was coordinator, to be addressed by President Hayes on May 22, 1960 (F.118, First Trial R.199).

On May 15, 1960, Grand Lodge Representative Joseph Curran, who was billed as an expert, addressed a meeting

of 409 picket captains from Lodges 1746 and 743 and instructed them about their strike duties. He had been assigned by Vice President Coonley at District 91's request, and after the meeting District Organizer Jutras reported to Mr. Coonley that the meeting was very successful and that "these captains fully realize the seriousness of the impending situation and are better prepared to fulfill their obligation." Mr. Curran had been the Grand Lodge Representative assigned to the Republic Aviation Lodge at the time of its violent and successful strike in 1956 (F.119-126, First Trial R.199-200).

A scheduled mass meeting of Lodges 1746 and 743 at Bushnell Hall was held on Sunday, May 22, 1960. The unions had made a big effort to produce a large attendance at the meeting but there was not a large audience, and President Hayes, who addressed the meeting, was disappointed at the turnout (F.141, First Trial R.202).

The next day, May 23, 1960, strike votes were taken. At Lodge 1746, 3488 voted in favor of a strike and 788 voted against it. At Lodge 743, 1493 voted in favor of the strike, and 289 voted against it (F.142, First Trial R.202).

Prior to the strike Grand Lodge Representative Thurer had discussed with Senior Business Representative Main the assignment of District 91 personnel during the strike. Mr. Main was directly in charge of the strike, and also had the function of going to the police station and bailing out those who were arrested on the picket line. District Organizer Jutras was Mr. Main's assistant in charge of the strike and coordinated the activities of the other Business Representatives and District Organizers. Business Representatives Cope and Nelson were to supervise activities at the gates of the East Hartford plant. and it was Mr. Cope's intention in that assignment that the strikers block the gates at the East Hartford plant so that the employees would not be able to get into work. District

Organizer Davis's assignment was to keep the gates manned by pickets. Business Representative Sullivan was to supervise activities at the gates of the Hamilton Standard plants (F.130-137, First Trial R.201).

On June 5, 1960, at Lodge 743's last meeting before the strike, Business Representative Sullivan commented about the possibility of violence during the strike and of the state police being called when the strike started; he also told the employees that he wanted everybody at the plant at the gates, since that was his idea of a picket line (F.148-149, First Trial R.203).

3. *Commencement Of The Strike.* On May 25, 1960 both Lodges 1746 and 743 applied to the International for strike sanctions (F.152, First Trial R.204). About June 2, 1960 the International granted strike sanctions, and released them to General Vice President Coonley for release to Lodges 1746 and 743 at his discretion (F.155, First Trial R.205).

The strike at Pratt & Whitney's East Hartford and Manchester plants by Lodge 1746 began on Wednesday, June 8, 1960 about 9:00 a.m., and immediately thereafter General Vice President Coonley sent a telegram to Senior Business Representative Main retroactively releasing the strike sanction (F.162, 163, First Trial R.206).

Lodge 743's strike at Hamilton Standard's Windsor Locks and Broad Brook plants commenced at about 9:55 a.m. on June 8, 1960 (F.231, First Trial R.214).

Almost immediately after the beginning of the strike in East Hartford, District Organizer Jutras addressed about 400 members of Lodge 1746 in the union hall across the street from the plant. He told them "now it becomes our job to try to keep as many second shift employees from going into that plant as we possibly can and that can only be done by mass picketing" (F.167-168, First Trial R.206-207). At the liability trial a sound television film of Jutras' speech was shown (F.169, First Trial R.203).

Both at the liability trial and at the second damages trial were projected movie films taken by plaintiff and showing events at the gates of its East Hartford, Windsor Locks and Broad Brook plants during the period from Wednesday, June 8, 1960 through Monday, June 13, 1960 (F.170, 257, First Trial R.208, 218; A.36a, 99a). In addition there were still photographs of such activities and testimony describing those activities. The strike activities at all the plants were so similar that it was clear that both Lodges 1746 and 743 were acting in concert in their activities prior to and during the strike (F.281, First Trial R.221). During the period from June 8, 1960 through June 13, 1960, pickets by the hundreds massed shoulder to shoulder were found at every entrance. Cars trying to enter the plant were blocked by masses of pickets. Police had to employ force to attempt to open passageways for employees and vehicles entering the premises. Drivers and occupants of cars were subjected to a variety of contemptuous gestures. Employees were physically attacked. Profanities and obscenities were shouted along with threats of physical harm. Strikers ostentatiously noted license numbers and occupants of the cars entering and leaving the plant, and other strikers took pictures of the cars and occupants, all in an attempt to intimidate workers. Mirrors and radio antennas were torn off cars. Shoving, kicking, pushing and slapping of cars was commonplace. Hundreds of cars turned back. Law enforcement officers, both state and local, were shoved against and on the hoods of the cars. Traffic as a result was snarled and backed up. Numerous arrests were made. Nails, tacks and other sharp objects were strewn on the highway approaches (F.171-186, 234-256, First Trial R.208-210, 215-218). Most of the officials of the International, District 91 and the two local lodges participated in those activities (F.187-222, 258-276, First Trial R.210-213, 218-220).

4. *The Injunction Proceedings.* Shortly after the commencement of the strike, plaintiff instituted actions against the International and Lodges 743 and 1746 in the Superior Court for Hartford County, Connecticut, seeking solely injunctive relief against the mass picketing, violence, and other illegal activities occurring at the gates of its plants (F.282-283, First Trial R.221). After the actions were brought International General Counsel Papps came to Hartford to represent the defendants. He was shown movies of the mass picketing and other unlawful activities at the East Hartford plant and also saw mass picketing in person at both the East Hartford and the Hamilton Standard plants. He admitted to plaintiff's representatives that the movies would constitute strong evidence in a damage suit against the unions involved (F.286-294, First Trial R.221-223). The next morning, June 13, 1960 United Aircraft Corporation, the International, and Lodges 1746 and 743 entered into stipulations providing that the defendants would desist and refrain from mass picketing and other illegal activities at the gates of plaintiff's plants (F.295-297, First Trial R.223-226). Before the entering into of the stipulations General Counsel Papps spoke with Grand Lodge Representative Thurer, Senior Business Representative Main, Business Representatives Cope and Sullivan, and Presidents Fraser and Seedman, who opposed the stipulations because they felt they ought to be permitted to have more pickets than the stipulations permitted (F.298, First Trial R.226).

The Regional Director of the National Labor Relations Board also brought a federal court action seeking an injunction against the unlawful activities, and on June 16, 1960 the International and Lodges 1746 and 743 entered into a stipulation with respect to that action (F.301-303, First Trial R.226-229).

5. *Strike Activity After June 13, 1960.* In spite of defendants' assertions in their Petition (pp. 6-7) that

their unlawful conduct virtually ceased after the Superior Court stipulations, the facts are otherwise (F.308-309, First Trial R.230). Pickets continued to trouble employees entering and leaving the plants (F.314-315, First Trial R.231) and also truckers and contractors attempting to get into the plant (F.316-319, First Trial R.231-232). At the East Hartford plant there were 538 reports from employees of incidents involving property damage occurring while employees were going through the picket lines to enter and leave the plant or at the plant parking lots (F.310, First Trial R.230-231; F.3, Second Trial R.138). Seventy-five of the incidents occurred from June 14, 1960 through June 30, 1960, and 92 of the incidents occurred in July. A total of 171 of the incidents occurred between June 14, 1960 and the end of the strike (F.3, Second Trial R.138). At the Hamilton Standard plants between 200 and 300 reports were received from employees of incidents occurring during the strike (F.312, First Trial R.231). A very substantial majority of these incidents, which included verbal abuse and intimidation of employees, threats to employees, injury to employees, and damage to their property, occurred as they were going through the picket lines to enter and leave the plants or at the plant parking lots. About one-half were of incidents that occurred before June 14, 1960, and the other one-half were of incidents that occurred between June 14 and the end of the strike (F.4, Second Trial R.138).

6. *Settlement Of The Strike.* Negotiations to end the strike were unavailing until General Counsel Papps came to Hartford and negotiated a proposed agreement just prior to July 23 (F.378, 389, First Trial R.242-243). A meeting of Lodge 1746 was held at Bushnell Hall on July 23 to consider ratification of this contract, and, as Vice President Coonley and Grand Lodge Representative Giglio had advised Mr. Papps it would be, the meeting was riotous,

with the International, District, and local officials present doing nothing to obtain order, and in fact obviously encouraging the mob (F.390-391, First Trial R.243). The contract was rejected (F.391, First Trial R.243). However, the failure of the strike continued to become more apparent and on August 8, 1960, Lodge 743 voted to end the strike and accept the proposed contract, and Lodge 1746 did likewise the next day (F.392, First Trial R.244).

7. *Absence of Plaintiff's Employees During The Strike.* During the strike, although plaintiff continued to operate the struck plants, thousands of bargaining unit employees were absent from work on one or more days (F.227, 228, Second Trial R.177-179).

At the East Hartford plant of Pratt & Whitney, there were 266,000 bargaining unit days of absence during the strike period (F.299, Second Trial R.202). At the Windsor Locks and Broad Brook plants of Hamilton Standard, there were 91,000 bargaining unit days of absence during the strike period (F.301, Second Trial R.202).

At the second damages trial the plaintiff introduced into evidence the testimony of 181 employees of its East Hartford plant (113 as witnesses and 68 by the transcripts of their prior testimony at the first damages trial) and 27 Hamilton Standard employees (22 as witnesses and 5 by the transcripts of their prior testimony), (F.13-15, Second Trial R.140) who (with several exceptions) not only testified that they (and in some cases fellow employees) were absent from work during the strike becaues of fear or inability to get into the plants but also described in vivid detail defendants' unlawful activities at plaintiff's plants (F.20-223, Second Trial R.141-176). In addition, there was expert testimony from Professor Herbert R. Northrup of the Department of Industry of the Wharton School of Finance and Commerce of the University of Pennsylvania (F.246-247, Second Trial R.186-187) and Morgan R.

Mooney, plaintiff's retired Vice President for Industrial Relations (F.258, 264, Second Trial R.191, 192-193), explaining the effects of violence, mass picketing, and other unlawful activities at plaintiff's plant premises on employees, and giving their opinions as to what percentage of absent employees were out because of the unlawful activities at plaintiff's plant premises.

The trial court, having heard the employee witnesses and the expert testimony, having seen the movies of events at the gates of plaintiff's plants from Wednesday, June 8, 1960 through Monday, June 13, 1960, and having from the liability trial findings detailed knowledge of events that occurred before and during the strike (F.2-4, Second Trial R.137-138) found that the effects of the violence and mass picketing at plaintiff's plant premises continued up to and including July 1, 1960 (F.298, Second Trial R.202). It also found that the number of bargaining unit employee absences proximately caused by defendants' tortious acts at the East Hartford plant premises was 62,900, or 23.6% of the 266,000 total bargaining unit absences during the strike period (F.299, Second Trial R.202). It also found that the number of bargaining unit employee absences proximately caused by defendants' tortious acts at Hamilton Standard's Windsor Locks and Broad Brook plant premises was 17,600, or 19.3% of the 91,000 total bargaining unit absences during the strike period (F.301, Second Trial R.202).

8. *Strike Losses and Damages.* Because of the absence of substantial numbers of plaintiff's employees during the strike, its manufacturing costs during the strike were higher than they would have been if there had been no strike (F.326-328, 338-340, Second Trial R.206, 208-209). In addition, part of its fixed overhead expenses was wasted during the strike because those fixed expenses could not be reduced to compensate for the reduced number of employees

working (F.329-333, 341-345, Second Trial R.207, 209-210). Plaintiff's Comptroller, Charles B. Preston, provided detailed computations of such excessive costs and wasted overhead expenses (F.303-346, Second Trial R.203-210).

The Trial Court found that plaintiff's strike losses during the strike amounted to $4,149,151 at Pratt & Whitney's East Hartford and Manchester plants and $2,304,718 at the Hamilton Standard plants (F.334, 346, Second Trial R.207-208, 210). It also found that those figures did not include certain additional losses caused by the strike, such as losses in the experimental shop, which could not be measured objectively, losses by reason of the absence of indirect labor employees, and losses which continued after the strike during the remainder of 1960 and into 1961. (F.332, Second Trial R.206).

Having found plaintiff's total strike losses, the trial court proceeded to apportion the losses so as to calculate the amount resulting from defendants' unlawful activities (F.355, 356, Second Trial R.212). It did this by multiplying plaintiff's total strike losses (F.334, 346, Second Trial R.207-208, 210) by the percentages of absent employees who were absent because of the unlawful activities (F.299-302, Second Trial R.202-203). Pursuant to this calculation, it concluded that damages in the amount of $979,200 were sustained at the Pratt & Whitney Division and $444,811 at the Hamilton Standard Division, and awarded damages in such amounts together with interest from the date of judgment, September 4, 1973 (F.355, 356, 362, 363, Second Trial R.212, 213).[4]

Reasons for Denying the Petition

These actions brought by plaintiff in 1963 and consolidated in the Connecticut courts are strictly common law actions claiming damages resulting from defendants' inten-

4. Only the defendant unions, and not their members, are liable for the judgments, because only the unions are parties to the actions. Conn. Gen. Stat. §52-292.

tional torts during a strike in 1960. The petition is an obvious effort to clothe a well-settled evidential question governed by Connecticut law in federal due process and preemption garb so as to again seek review here.[5]

A. The First Claimed Question Is Not Presented.

The first claimed question is based on the same distortions of the evidence and the facts found by the trial court as appear in petitioners' Statement of the Case and History of This Litigation.

The trial court's determination of the amount of absence caused by defendants' tortious activities was not based "only" on the opinions of Mr. Mooney (A.98a-106a); it also had before it the opinions of Dr. Northrup (F.248,249, Second Trial R.187-189; A.99a-100a, 102a-105a); the testimony of 208 employees as to the effects of the unlawful acts (F.20-225, Second Trial R.141-176); findings describing and movies showing the unlawful acts (F.170-186,234-257,308-315,347-354,358-364, First Trial R.208-210,215-218,230-231, 237-240); and the number of union members, the votes rejecting plantiff's contract offers, the strike votes, the number of employees who worked each day of the strike, and the number of union members who received strike benefits (F.101,113,142,233,234, First Trial R.196,198,202; F.227,228, 233,234, Second Trial R.177-180).

Mr. Mooney was found to be an expert (F.264, Second Trial R.192-193; A.117a-119a). There was no evidence or finding of bias because he was a former "employer official."

Mr. Mooney made no "factual assumptions" and testified on the basis of his personal knowledge, not upon assumptions contained in a hypothetical question (F.264, 267, Second Trial R.192-193).

5. An earlier petition for certorari was denied, 404 U.S. 1016 (1972). So was the petition for certorari in the unsuccessful effort to enjoin the prosecution of these actions on preemption grounds. *International Assn. of Machinists* v. *United Aircraft Corp.*, 56 L.R.R.M. 2389 (D. Conn. 1964), *aff'd* 333 F.2d 367 (2d Cir. 1964), *cert. denied* 379 U.S. 946 (1964).

The connection between the facts and Mr. Mooney's opinions and his method for arriving at his opinions were explained in his testimony and described in the findings of the trial court. (F.267, 268, Second Trial R.193-194; A.104a, 121a).

Mr. Mooney's opinions were not contradicted by any facts found by the trial court, and petitioners point to none.

B. The Second Claimed Question Was Not Timely And Properly Raised Below.

Footnote 1 on page 3 of the Petition is petitioners' only attempt to comply with this Court's Rule 23.1.(f) and to show that the claimed "due process" question was timely and properly raised below. Footnote 1 makes it obvious that it was not.

Section Fourth of the trial court's Finding sets out the claims of law made by the defendants at the second damages trial; although there are 38 claims of law, none refers to due process. (Second Trial R.237-246). There is no mention of due process in the trial court's memorandum of decision (A.94a-106a).

Petitioners, apparently aware of this deficiency, point to only one clause from their 91-page brief to the Connecticut Supreme Court to support their contention that this issue was "expressly" raised below (Petition p.3,n.1.): ". . . indeed, the finding with respect to the amount of involuntary absenteeism attributable to defendants is so devoid of legitimate evidentiary support that the substantial judgment entered deprives defendants of property without due process of law." Such rhetoric, without more, is insufficient

to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).[6]

It is obvious that the due process question was not "specially set up or claimed under the Constitution . . ." by the petitioners in the proceedings below, as required by 28 U.S.C. § 1257(3), pursuant to which this Court has stated that it will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinal* v. *Louisiana,* 394 U.S. 437, 438 (1969); *Tacon* v. *Arizona,* 410 U.S. 351, 352 (1973). A review of the decision of the Supreme Court of Connecticut shows that this question was not passed on by that court, as required by the foregoing decisions. This principle is not new. *Crowell* v. *Randell,* 10 Pet. 368 (1836).

C. No Federal Question of Substance is Presented.

1. *Weighing the Evidence was the Province of the Trial Court.*

In *United Mine Workers* v. *Gibbs,* 383 U.S. 715 (1966), this Court reviewed the principles applicable to tort actions for damages caused by strike violence as follows:

> This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by the passage of federal labor legislation. *Allen-Bradley Local* v. *Wisconsin Board,*

6. *Bowe* v. *Scott,* 233 U.S. 658, 664 (1914). Also, the mere allegation of a denial of "due process of law" is insufficient to support a claim that the due process clause of the 14th Amendment has been violated. *Bowe* v. *Scott, supra* at 664; *Brady* v. *Maryland,* 373 U.S. 83, 91 (1963). This Court has also held that, where the applicable state constitution has a "due process" clause, a bare allegation of denial of due process will be deemed to relate to the state constitution and therefore is insufficient under 28 U.S.C. § 1257(3). *Bowe* v. *Scott, supra* at 664-65. The Connecticut Constitution has a due process clause. Conn. Const., Art. I, Sec. 8.

> 315 U.S. 740; *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656; *United Automobile Workers* v. *Wisconsin Board,* 351 U.S. 266; *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 131; *United Automobile Workers* v. *Russell,* 356 U.S. 634. Petitioner concedes the principle, but argues that the permissible scope of state remedies in this area is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity. We agree. 383 U.S. at 729.

In view of the Connecticut Supreme Court's reiteration of those principles (A.68a, 81a, 82a), defendants cannot and do not contend that the Connecticut courts failed to apply them. (Petition 34). Nor do they argue that there was no evidence to support the damage awards, since their quarrel is that Mr. Mooney's opinions were adopted by the trial court. (Petition 8). Instead they argue that the trial court weighted the evidence improperly and that the Connecticut Supreme Court improperly reviewed the trial court's findings, and on that basis they invite this Court to review the entire record below and to reweigh the evidence.

But the weighing of the evidence is clearly within the province of the trial court, regardless of whether the case is considered in the preemption terms of petitioners' first question or the due process terms of the second question. As this Court said recently in *American Radio Ass'n.* v. *Mobile Steamship Ass'n.,* 419 U.S. 215 (1974):

> Petitioners' final contention is that the record fails to support the conclusion that a substantial question existed as to whether the picketing constituted "wrongful interference" under Alabama law. The question of whether evidence is sufficient to make out a cause of action created by state law and tried in the state courts is a matter for decision by those courts. Insofar as petitioners' argument on this score may be read to suggest that the evidence before

> the Alabama court would not support a finding that their activities were such as could be enjoined under *Vogt, supra,* we reject it. . . . This argument ignores the wide latitude open to triers of fact to make factual determinations on the basis of rational inferences which arise from the nature, location, and effect of picketing. 419 U.S. at 231-232.

That case involved both a preemption question and a Fourteenth Amendment claim. Even in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U.S. 287 (1941), a First Amendment case, this Court said:

> It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. 312 U.S. at 294.

2. *The Connecticut Rule of Evidence Re Expert Testimony Is Not Unreasonable.*

The Connecticut Supreme Court in its second opinion (A.110a-125a) explained the Connecticut rule of evidence regarding expert testimony as follows (A.120a-121a):

> This state has long had a simple and workable standard for the admissibility of expert opinion. "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." *Taylor* v. *Monroe,* 43 Conn. 36, 44, cited with approval *Schomer* v. *Shilepsky,* Conn. (37 Conn. L.J., No. 4, pp. 10, 12). Implicit in this standard is the requirement, later articulated, that the expert's knowledge or experience must be directly applicable to the matter in issue. *Siladi* v. *McNamara,* 164 Conn. 510, 513-14, 325 A.2d 277.

The rule in *Taylor* v. *Monroe* is quoted with approval by Wigmore in his section dealing with the test for receiving opinions of skilled witnesses. 7 Wigmore, *Evidence* (3d Ed.) 21-22. See also 31 Am Jur 2d, Expert and Opinion Evidence 744-748. Rule 702 of the Federal Rules of Evidence is similar.

3. *The Connecticut Rule Was Properly Applied.*

The trial court found that Mr. Mooney and Prof. Northrup were qualified to render opinions regarding the number of employee absences caused by the defendants' tortious acts. (F.247, 264, Second Trial R.187, 192-193). Prof. Northrup based his opinions on hypothetical questions

incorporating the facts found by the trial court and contained in the record; Mr. Mooney based his opinions on his personal knowledge of the events during the strike (F.267, Second Trial R.193). The trial court, which had before it the facts contained in the record and which had seen the movies of the violence, adopted Mr. Mooney's opinions of the number of employees absent because of the tortious acts through July 1; it found the underlying facts insufficient to prove the causation of absence after that date (F.298, Second Trial R.202; A.105a, 123-124a), and therefore did not adopt Mr. Mooney's opinions of the number of absences after July 1 caused by the tortious acts. It thus used Mr. Mooney's opinions as an "aid to the court . . . in determining the questions at issue," as provided in the Connecticut expert testimony rule.

Conclusion

The first claimed question is not presented by the record, and the second was not timely and properly raised below. Even if the questions were presented, they raise no undecided federal questions, and do not meet the criteria contained in Rule 19.1.(a) of this Court's rules. The petition should be denied so that this litigation may finally come to a conclusion.

Respectfully submitted,

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April 21, 1976